United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 6 1970

Nathan J. Paulson
CLERK

No. 24,111
(Cr. 223-69)

UNITED STATES OF AMERICA,

Appellee,

v.

LARRY J. WILKERSON,

Appellant.

BRIEF OF APPELLANT

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Attorneys For Appellant,
Appointed By This Court.

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TABLE OF AUTHORITIES

Statutes:

Principal Statute Involved:

D. C. Code, Title 22, Section 3214:

> "(a) No person shall within the District of Columbia possess any machine gun, sawed-off shutgun, or any instrument or weapon of the kind commonly known as blackjack, slung shot, sand club, sandbag, switch-blade knife, or metal knuckles, nor any instrument, attachment, or appliance for causing the firing of any firearm to be

silent or intended to lessen or muffle the noise of the firing of any firearms: Provided, however, That machine guns, or sawed-off shotguns, and blackjacks may be possessed by the members of the Army, Navy, or Marine Corps of the United States, the National Guards, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law-enforcement officiers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under section 22-3210.

"(b) No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than three inches, or other dangerous weapon.

"(c) Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be imprisoned for not more than ten years."

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* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	Case No. 24,111
	)	Criminal No. 223-69
LARRY J. WILKERSON,	)	
	)	
Appellant.	)	

BRIEF OF APPELLANT

Larry J. Wilkerson, appellant herein, by his Court-appointed attorneys, herewith respectfully submits his Brief in the above-captioned appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can Appellant's conviction for alleged possession of a prohibited weapon (sawed-off shotgun) under D. C. Code, Title 22, Section 3214(a) stand, in light of the fact that there was failure on behalf of the Government to introduce any evidence relating to one of the essential elements of the charged offense?

2. At trial, especially in light of Luck and its progeny, is testimony relating to a prior conviction of Appellant for robbery (under D. C. Code, Title 22, Section 2901) admissible when the previous offense occurred 5 years before the trial in question (when Appellant was a juvenile) and where the charged offense at trial is possession of a prohibited weapon (under D. C. Code, Title 22, Section 3214(a))?

3. Does the admission of testimony that Appellant was riding in an automobile (when stopped by police officers) allegedly taken without permission have any relevance to the offense of possession of a prohibited weapon; and did the admission of such testimony so prejudice Appellant that it was impossible for him to receive a fair trial?

* * *

These arguments were previously presented to this Court (as styled above) in Appellant's Motion For Summary Reversal filed August 18, 1970 and, partially, in

Appellant's Reply To Opposition To Motion For Summary Reversal filed September 3, 1970.

In an Order released October 7, 1970, this Court denied Appellant's Motion For Summary Reversal and ordered that the time for filing Appellant's Brief be extended for 30 days from the date of the Order.

REFERENCES TO RULINGS

Appellant was convicted of the offense of possession of a prohibited weapon in violation of D. C. Code, Title 22, Section 3214(a), in trial by jury, February 4, 1970 (Tr. 85)*.

A Notice of Appeal was timely filed and the Court appointed counsel herein to represent Appellant in his appeal.

A Motion for Summary Reversal was filed by Appellant August 19, 1970. An Opposition to Motion For

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* "(Tr. 85)" and similar references in this pleading refer to the Transcript of Proceedings of Appellant's trial in the United States District Court for the District of Columbia.

Summary Reversal was filed August 28, 1970 by Appellees. Appellant thereafter filed a Reply to Opposition To Motion For Summary Reversal on September 3, 1970. This Court, on October 7, 1970, denied Appellant's Motion For Summary Reversal and ordered the time for filing this brief be extended 30 days.

STATEMENT OF THE CASE

Appellant was convicted in the United States District Court for the District of Columbia of the offense of possession of a prohibited weapon in violation of D. C. Code, Title 22, Section 3214(a) (Tr. 85). Because of a prior conviction, Appellant was sentenced, pursuant to D. C. Code, Title 22, Section 3214(c) to 3 to 10 years imprisonment. In 1965, at the age of 18, Appellant had been convicted of robbery [1] and assault with a dangerous weapon, [2] and had been sentenced under the Federal Youth Corrections Act. [3]

1/ D. C. Code, Title 22, Section 2901

2/ D. C. Code, Title 22, Section 502.

3/ 18 U.S.C. Section 5010(b).

The facts surrounding Petitioner's arrest and conviction are as follows:

On or about January 8, 1969, at approximately 1:15 P.M., officers of the Metropolitan Police Department stopped an automobile, in which Appellant was a passenger, for speeding (Tr. 6). The juvenile driver could not produce satisfactory proof of ownership of the automobile (Tr. 7, 21). The driver, Appellant, and another juvenile passenger, on request, followed the officers to Precinct No. 9 (Tr. 12-13).

Undisputed testimony elicited at trial indicated that the individuals in the automobile, including Appellant, did not attempt to flee; rather, they dutifully followed the officers to the precinct several blocks away (Tr. 12, 43).

Other testimony indicated that Appellant had been picked up by the two juveniles at the intersection of Florida Avenue and Rhode Island Avenue a short time before the automobile was stopped by the police officers (Tr. 48).

When Appellant arrived at the precinct, he and the other juvenile waited in the automobile while the driver accompanied police officers into the station house. Trial

testimony indicates that Appellant waited inside the automobile for 5 to 20 minutes; again, no attempt was made to flee (Tr. 15, 25, 44).

Subsequently, two police officers came out of the station and asked Appellant and the other juvenile to step into the precinct (Tr. 16, 21, 44).

At trial, the police officers claimed that Appellant, who had been sitting in front of the police station from 5 to 20 minutes, got out of the automobile, on the officers' request, clutching a sawed-off shotgun beneath his coat (Tr. 21-22). Appellant testified that he was not carrying the shotgun and that, in fact, he had never seen the weapon prior to his arrival in the precinct (Tr. 44-45).

ARGUMENT

I. THE GOVERNMENT DID NOT PROVE ALL ELEMENTS OF THE ALLEGED CRIME

The statute under which Appellant was convicted provides that,

> "No persons shall...possess any machine gun, sawed-off shotgun... provided, however, that machine

> guns, or sawed-off shotguns, and blackjacks may be possessed by the members of the Army, Navy, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law-enforcement officers, officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail lealers licensed under Section 22-3210."4/

It is clear from the statute that two essential elements must be proven beyond a reasonable doubt for a conviction to stand thereunder. The Court noted this in conference with counsel before the bench (Tr. 59); and the Judge specifically instructed the jury (Tr. 81) that there are two essential elements to the crime:

4/ D. C. Code, Title 22, Section 3214(a).

"The first essential element is that the defendant did have in his possession a prohibited weapon, namely, a sawed-off shotgun.

And...the second essential element is, that he was not at the time he had the gun in his possession a member of the Army, Navy, Marine Corps, National Guard, or organized reserve while on duty nor was he a member of the Post Office Department on duty or marshal, a sheriff, a prison or jail warden, or their deputies or a policeman or any other duty appointed law enforcement officer, duly authorized to carry such weapon or any other law enforcement officer specified within the code."

It is basic law that the Government must prove every essential element of the offense. Communist Party of United States v. United States, 118 U.S. App. D.C. 61, 331 F.2d 807 (1963); Newsom v. United States, 335 F.2d 237 (5th Cir. 1964); Colt v. United States, 158 F.2d 641 (5th Cir. 1946). The presumption is one of innocence. The Government has the burden of proving all essential allegations beyond a reasonable doubt.

This Court has specifically recognized this axiomatic principle of criminal law. In United States v.

Thweatt, United States Court of Appeals for the District of Columbia Circuit, No. 22,772, Slip Op. June 30, 1970, at page 10, this Court, in reversing a grand larceny conviction because all elements of the crime were not proven, declared,

> "...it is equally fundamental, however, that the government must introduce probative evidence of each and every element of the crime charged...and that failure to offer such proof is fatal to the government's case."

In Sutton v. United States, 157 F.2d 661 (5th Cir. 1946), the Court considered a statute remarkably similar to the statute in question here. In Sutton, it was argued that the statute contained an exception that should have been offered as a defense. In essence, the argument was made that there were not two elements, but, rather, one element and an exception to be offered as a defense. In reply to this contention, the Court succinctly declared that the statute, without the exception, was, in effect, meaningless:

> "Omit the exception and the [statute] simply provides that no person shall possess [prohibited items]. Clearly, no one intended this: therefore, it was necessary for the information, by proper allegation, to negative the exception of the first sentence."
>
> * * *
>
> "...if the exception itself is incorporated in the definition of the offense so that the elements of the crime are not fully stated without the exception, then it must be negatived." (Emphasis added.) Sutton, supra, at 665-666. 5/

This is precisely the situation at hand. Without the excepting clause, the statute would be meaningless and would simply provide that no one could possess certain weapons.

At Appellant's trial, the Court recognized that there were two elements to the crime and that both had to be proven beyond reasonable doubt. However, just prior to beginning the closing argument,

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5/ Accord, United States v. Bailey, 277 F.2d 560 (7th Cir. 1960); Hale v. United States, 89 F.2d 578 (4th Cir. 1937).

but after all the evidence was in, counsel for the Government expressed bewilderment on learning that the Court would instruct the jury that there are two elements to the charged offense (Tr. 61):

> [GOVT. COUNSEL] "On the first one, on 3214(a), I must confess I didn't anticipate this as to the various occupations you referred to...."
>
> [THE COURT] "It is an element in the case...."

The record in the instant case is devoid of evidence from which the jury could determine, beyond a reasonable doubt, that Appellant was not a member of the groups or organizations delineated with specificity in the statute as comprising the "second essential element" of the crime.

Counsel for Appellant timely made a motion for judgment of acquittal, arguing the Government had failed to carry its burden of proof. The motion was overruled (Tr. 36).

All of the elements of the crime were not proven beyond a reasonable doubt. For this reason alone, Appellant's conviction should be reversed.

II. ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR CONVICTION WAS ERROR.

At trial, Appellant elected to take the stand and testify on his own behalf.

Before direct examination of Appellant, the Judge called counsel to the bench and specifically admonished counsel for the Government not to question Appellant about his prior conviction (Tr. 40).

During direct examination, Appellant testified that he had never owned a gun (Tr. 44). Just prior to closing cross-examination of Appellant, counsel for the Government asked permission to approach the bench. The following colloquy ensued (Tr. 52-53):

> [GOVT. COUNSEL] "Your Honor, in light of the defendant's statement to the effect that he never owned a gun in his life and so on, I would ask that I be permitted to impeach him with his prior conviction."
>
> * * *
>
> [THE COURT] "You may ask the question.

[GOVT. COUNSEL] "Mr. Wilkerson, did you know that was an Avis-Rent-Car? 6/

[APPELLANT] "No, sir.

[GOVT. COUNSEL] "That had been taken without permission? You didn't know that?

[APPELLANT] "No, sir.

[GOVT. COUNSEL] "My final question, sir, are you the same Larry J. Wilkerson convicted of robbery in 1965?

[APPELLANT] "Yes, sir."

It is axiomatic that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the individual committed the crime charged. See, Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1965).

> "Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes, unless that evidence can be admitted for some substantial, legitimate purpose." (Emphasis supplied.) Drew, supra, at 15, 331 F.2d at 89.

6/ As will be shown, infra, these questions relating to the automobile are clearly error — irrelevant and substantially prejudicial to Appellant.

It is true that evidence of other crimes is admissible when relevant to a common scheme or plan embracing the commission of two or more crimes related to each other; the proof of one tends to establish the other. It is obvious here, however, that riding in an automobile allegedly taken without permission is totally unrelated to the possession of an allegedly prohibited weapon. Moreover, Appellant was never charged with any crime relating to the alleged taking of the automobile in question.

An exercise of judicial discretion, including a weighing of relevant factors (such as remoteness, relative bearing on creditibility, propensity to crime, and the like), is necessary before allowing the introduction of evidence of a prior conviction. Luck v. United States, 121 U.S. App. D. C. 151, 348 F.2d 763 (1965); Gordon v. United States, 127 U S. App. D.C. 343, 383 F.2d 936 (1967). The relevant determination for the trial court is the bearing each prior conviction has on veracity "weighed against the degree of prejudice which [its] revelation ...[will] cause." Gordon, supra, at 346, 383 F.2d at 939.

In the instant case, it was impossible for the Court to make such a determination. Counsel for the Government intimated that Appellant was lying when he said he had never owned a gun (Tr. 52). No proof or evidence of Appellant's possible ownership of a gun was offered the Court by the Government. The Court obviously did not have independent knowledge of prior ownership of a gun (Tr. 37).

Thus, (1) the Government asked the Court to allow the question relating to Appellant's prior conviction; however, (2) the Government failed to produce any evidence, or to make any statement, to show that Appellant had, in fact, ever owned such a weapon. Therefore, (3) the Court had no evidence before it from which to decide that introduction of Appellant's prior conviction was warranted.

Clearly, the introduction of Appellant's prior conviction violates the rules enunicated in Luck, supra, and its progeny.

The standard to be applied is whether the Judge "believes the prejudical effect of impeachment far outweighs

the probative relevance of the prior conviction to the issue of credibility." (Emphasis added.) Luck, supra, at 156, 348 F.2d at 768. "...[A] showing of prior convictions can have genuine probative value on the issue of credibility, but that because of the potential prejudice, the receiving of such convictions...[is] discretionary." (Emphasis added.) Gordon, supra, at 346, 383 F.2d at 939.

Here, the Court did not have sufficient evidence before it to make such a decision. The prejudical effect of an admission of a conviction (nearly five years before, when Appellant was 18 years of age) far outweighs the probative value of such testimony. It is respectfully requested that the Court notice this plain error which substantially affects Appellant's rights. 7/

III. ADMISSION OF TESTIMONY THAT THE AUTOMOBILE IN WHICH APPELLANT WAS RIDING WAS TAKEN WITHOUT PERMISSION WAS ERROR.

Early in the proceedings, counsel for the Government cautioned a prosecution witness about going into details

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7/ Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 52(b).

of the taking of the automobile in which Appellant was riding (Tr. 21). Nevertheless, in concluding the direct examination of this same witness, the Government asked (Tr. 24),

> [GOVT. COUNSEL] "Did you ascertain who the owner of the car was?
>
> [WITNESS] "Yes, it was owned by Avis Car Rental and it was not checked out that day, it was taken from the lot at National Airport, but they did not want to prosecute that case.
>
> [GOVT. COUNSEL] "You determined it was taken without permission?
>
> [WITNESS] "Yes, it was.
>
> [GOVT. COUNSEL] "I see, thank you."

Additionally, as noted supra, p. 13, the Government, upon being given permission to question Appellant regarding his prior conviction, used the occasion to again introduce irrelevant and prejudicial testimony that the car in which Appellant was riding was taken without permission from Avis Car Rental at National Airport (Tr. 52).

It is inconsistent with the traditional concept of fair trial to permit introduction of any evidence which

might influence the jury to convict the defendant for any reason other than his guilt of the specific offenses with which he is charged. United States v. Harris, 331 F.2d 185 (4th Cir. 1964); Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948). Moreover, it is again appropriate to note that it is clear that evidence of one crime is inadmissible to prove disposition to commit crime.[8/]

Even assuming, arguendo, that Appellant was in some way connected with the taking of the automobile without permission, the inquiry into a collateral crime unconnected with the offense alleged is prohibited. Hubby v. United States, 150 F.2d 165 (5th Cir. 1945). "It is a general rule that evidence of a crime for which an accused has not been charged in the indictment is inadmissible and constitutes prejudicial error." Moses v. United States, 297 F.2d 621, 623-24 (8th Cir. 1961). Moreover, Appellant was never charged with any offense relating to the alleged taking of the automobile in question.

8/ Drew, supra.

The cumulative effect of the testimony relating to Appellant's prior conviction and the testimony relating to the unauthorized taking of the automobile in which Appellant was riding was manifestly so prejudicial to Appellant that it was impossible for him to receive a fair trial. The cumulative effect of this prejudicial testimony cannot be considered harmless error; it is respectfully requested that the Court notice these plain errors which substantially affect Appellant's rights.[9/]

CONCLUSION

It is respectfully submitted that Appellant, Larry J. Wilkerson, did not receive a fair trial. Not only (1) were all the elements of the alleged crime not proved beyond a reasonable doubt, but (2) irrelevant and highly prejudicial testimony relating to Appellant's prior conviction, and (3) highly prejudicial testimony regarding the car Appellant

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9/ Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 52(b).

was riding in when stopped by police officers, was allowed into evidence.

In light of the foregoing, it is respectfully requested that Appellant's conviction be set aside and the case remanded for new trial, or such other action that the Court may deem appropriate.

Respectfully submitted,

/s/ Lee G. Lovett
Lee G. Lovett

/s/ Joseph F. Hennessey
Joseph F. Hennessey

/s/ Eric T. Esbensen
Eric T. Esbensen

Court Appointed Counsel
For Appellant.

November 6, 1970.

CERTIFICATE OF SERVICE

I, Eric T. Esbensen, hereby certify that a copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, this 6th day of November, 1970, to John A. Terry, Esquire, Assistant United States Attorney, U. S. Courthouse, Washington, D. C. 20001.

/s/ Eric T. Esbensen
Eric T. Esbensen

1819 "H" Street, N. W.
Washington, D. C. 20006

Court-Appointed Counsel
For Appellant.

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,111

UNITED STATES OF AMERICA, APPELLEE

v.

LARRY J. WILKERSON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

Cr. No. 223-69

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 4

Nathan J. Paulson
Clerk

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Are the listed exceptions in 22 D.C. Code § 3214(a) a matter of prosecutorial proof, or are they affirmative defenses?

II. Where the court denied the prosecutor's requested *Luck* impeachment of the accused and the accused subsequently testified on direct examination contrary to his criminal record, could the Government then impeach the accused with a past robbery conviction?

III. Could the prosecutor permissibly question appellant about the stolen car in which he was riding when arrested when appellant was charged only with weapons offenses and not with unauthorized use of a vehicle?

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* This case was previously before this Court in appellant's motion for summary reversal dated August 18, 1970. On October 7, 1970, this Court denied appellant's motion and extended the time for appellant's filing of his brief.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,111

UNITED STATES OF AMERICA, APPELLEE

v.

LARRY J. WILKERSON, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 12, 1969, appellant was charged in a two-count indictment with possessing a sawed-off shotgun [1] and carrying a pistol without a license.[2] Trial by jury was conducted before the Honorable Oliver Gasch on February 4, 1970, and resulted in appellant's conviction on count one of the indictment. Appellant was sentenced on

[1] In violation of 22 D.C. Code § 3214 (a).

[2] In violation of 22 D.C. Code § 3204.

March 11, 1970, to three to ten years, to run concurrently with a previous sentence.[3] This appeal followed.

Officer Curtis E. William and Royster[4] were cruising in their scout car at 17th Street and Florida Avenue, N.E., at 1:15 p.m. on January 8, 1969. Officer William saw a yellow 1969 Plymouth moving east on Florida Avenue at an accelerated speed. The policemen pursued and stopped the car at 13th and H Streets, N.E. A juvenile, Donald Graffin, was driving the car; appellant sat in the front passenger seat. William Joseph, another juvenile, sat in the rear seat. There was no inspection sticker on the car. The driver's story as to who owned the car did not satisfy Officer William, so he requested the trio in the Plymouth to follow the scout car to the Ninth Precinct. They followed (Tr. 6-8).

Officers William and Royster escorted Donald Graffin into the precinct to determine whether Graffin was telling the truth about an uncle owning the car.[5] Appellant and William Joseph sat in the car and waited for the return of their chauffeur. Ten to twenty minutes later Officer William and Jan F. Kopacz emerged from the precinct and rejoined appellant and his friend.[6] William collected Mr. Joseph, and Kopacz had appellant get out of the car. Appellant wore a long gray tweed coat and kept his hands in his pockets. As appellant got out of the car, Kopacz saw part of the barrel of the sawed-off shotgun sticking out from beneath appellant's coat. Kopacz yelled,

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[3] Appellant was convicted in Criminal Case No. 1121-65 of robbery and assault with a dangerous weapon in 1965. He was sentenced pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. § 5010 (b).

[4] Officer Royster did not testify, and his full name does not appear in the record.

[5] Graffin's efforts to inoculate his story with the corroboration needed to permit him to go about his business failed. The officers were quick to discover that the yellow Plymouth was stolen from the Avis Car Rental located at National Airport (Tr. 7, 13, 24).

[6] Officer Royster remained in the precinct and detained the juvenile driver, Donald Graffin (Tr. 15).

"He has a gun," and grabbed it. On the seat where appellant had been sitting was a pistol (Tr. 6-32).[7]

At the close of the Government's case the court asked defense counsel if he had a motion, and defense counsel responded:

> Oh, yes. Well, of course, the standard motion, the Government has failed to completely carry their burden. They made statements and it is only through information that they got out of a juvenile, because these fellows in the car, if they were guilty—they'd have plenty of time to leave.

The court denied the motion (Tr. 36).

Appellant's trial counsel announced that appellant would testify. At the bench the prosecutor then sought the court's permission to use a 1965 robbery conviction to impeach appellant's credibility. The prosecutor remarked that the "very foundation stones" of *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967) *cert. denied*, 396 U.S. 1029 (1968), had been laid since the use of a previous robbery was not of such weight as to intimidate appellant into not testifying. The court ruled, somewhat unclearly, that the Government could use the robbery conviction against appellant (Tr. 37-39).[8] A short recess was taken. Then, immediately prior to appellant's taking the stand, the court called the prosecutor to the bench, where the following colloquy occurred:

> THE COURT: I don't want to interfer, don't question him with any questions.
> MR. BENNETT: In reference to—
> THE COURT: To robbery.
> MR. BENNETT: All right, judge (Tr. 40).

Appellant testified that when arrested he lived at 4012 Benning Avenue, Suitland, Maryland. He was picked up

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[7] Both weapons were loaded and when test-fired proved to be operable (Tr. 23).

[8] See footnote 15, *infra*.

by Graffin and Joseph at Florida and Rhode Island Avenues shortly before his arrest. Mr. Graffin offered to drive appellant to 15th and East Capitol Streets, and they were en route to that destination when the car was intercepted by the police at 13th and E Streets, N.E. Appellant testified that he did not know that a sawed-off shotgun was in his hand under his tweed overcoat or that a loaded pistol was on the seat within inches of where he had been sitting. Had appellant known that such lethal and incriminating items were present, he would not have sat inside the car for ten or twenty minutes, unguarded by the police, outside the police station with William Joseph while Graffin was inside. Appellant swore that he had never owned a gun (Tr. 40-51).

The prosecutor asked appellant for his previous residence prior to the Benning Avenue address, and appellant blurted out, "The Youth Center" (Tr. 46). Appellant admitted that he had been unemployed since October 1968 and that his previous employment had been as a construction worker (Tr. 41, 47, 50). The prosecutor approached the bench and said to the court, "[S]ince the defendant said he never owned a gun in his life and so on, I would ask that I be permitted to impeach him with his prior conviction" (Tr. 52). Defense counsel argued that appellant had not testified to what the prosecutor suggested. The testimony was read back by the court reporter, and the court permitted the prosecutor to impeach appellant with the robbery conviction (Tr. 52). The prosecutor asked appellant if he knew that the car in which he was riding when arrested was a stolen Avis rental car, and if appellant was the same man convicted of robbery in 1965[9] (Tr. 53).

At the close of all evidence the court advised counsel that it was going to instruct on both elements of 22 D.C. Code § 3214(a), *i.e.*, (1) possession of a sawed-off shot-

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[9] In 1966 appellant was convicted on a 1965 indictment of robbery and an assault with a pistol. The court permitted use of the robbery to impeach appellant's statement that he had never before owned a gun (Tr. 52).

gun and (2) that the accused was not a member of the Armed Services, or National Guard on duty, or a member of the Post Office Department or its employees on duty, or a Marshal, sheriff or prison or jail warden or law enforcement officer at the time of arrest. The prosecutor professed surprise at the court's ruling, since he considered the statutory exceptions to be an affirmative defense rather than a second element of the crime. The court answered that it was an element of the crime and that appellant had taken the stand and testified that he was none of the exceptions. Defense counsel admitted, "We know [appellant] is none of those" (Tr. 58-61).

The jury was instructed and returned a verdict of guilty on count one of the indictment.

ARGUMENT

I. None of the exceptions listed in 22 D.C. Code § 3214 (a) is an essential element of the crime of possessing sawed-off shotgun; rather, they are affirmative defenses.

(Tr. 36, 41, 47, 50, 59, 61, 81)

We agree with appellant that it is basic law that every essential element of the offense must be proved by the Government.[10] However, appellant apparently fails to appreciate the distinction between an exception as an element and as an affirmative defense in the questioned statute and, consequently, has become tangled in an erroneous argument.

Initially we note that at the close of the Government's case the defense made no motion for judgment of acquittal which related to appellant's specific challenge on appeal (Tr. 36). The cases are legion in support of our position that counsel must air his specific objection before the record is protected for appellate review. *E.g.*, *Battle*

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[10] *Communist Party* v. *United States*, 118 U.S. App. D.C. 61, 331 F.2d 807 (1963); *Newsom* v. *United States*, 335 F.2d 237 (5th Cir. 1964).

v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953); *Corbin* v. *United States*, 253 F.2d 646 (10th Cir. 1958).

Giving appellant the benefit of a motion he never really made, we submit nevertheless that he proved the exceptions himself when he testified that he was unemployed at the time of his arrest in January 1970 and that he had been unemployed from his job as a construction worker since October of 1969, when he was shot in a robbery (Tr. 41, 47, 50). Such testimony clearly leads one to the inference that when appellant possessed the sawed-off shotgun he was not on duty in the Armed Services or National Guard or as a Postal Employee or as a marshal, sheriff, policeman or prison or jail warden.[11] In fact the trial court recognized that appellant's own testimony excluded him from the company of any of the exceptions (Tr. 61). Additionally, defense counsel acknowledged that "We know [appellant] is none of these [exceptions]" (Tr. 59).

The meat of appellant's argument is that without the exception clause the statute would be meaningless. We disagree. The exception clause merely extends a statutory dispensation for certain persons to possess weapons which are prohibited to the general public. Clearly, this was the intent of Congress when it attempted to strengthen the weapons laws in 1954 by enacting 22 D.C. Code § 3214 (a). *Degree* v. *United States*, 144 A.2d 547 (D.C. Mun.

[11] 22 D.C. Code § 3214 (a) provides in pertinent part:

> No person shall within the District of Columbia possess any . . . sawed-off shotgun . . .: *Provided, however*, that . . . sawed-off shotguns . . . may be possessed by the members of the Army, Navy, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law-enforcement officers, officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under section 22-3210.

Ct. App. 1958). Congress recognized that there were too many weapons on the street that should be prohibited by law, and section 3214 (a) was enacted to prohibit the possession of saw-off shotguns and certain other weapons. Exceptions were added which were clearly intended to permit certain persons, whose occupation involved possessing weapons, to continue to possess those weapons while on duty.

The question which remains is whether the matter contained in the challenged exceptions is a "material part of the definition of the offense." If an exception

> is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is a matter of defense and must be shown by the other party, though it be in the same section or even in a succeeding sentence.

Cook v. *United States*, 84 U.S. 168, 176 (1872).[12] The exceptions in the instant statute are not a part of the definition of the offense, for without them the public would still be precluded from doing what it now cannot do, *i.e.*, possessing sawed-off shotguns. Congress has said that possession of a sawed-off shotgun is a violation of the law but has withheld application of the statute from specified groups of people. Whether appellant falls within one of those groups is something conveniently, and perhaps exclusively, within his knowledge, and requiring him to bring himself within the statutory exception would and did not subject appellant to any unfairness. *United States* v. *Fleishman*, 339 U.S. 349, 361-62 (1950); *Tot* v. *United States*, 319 U.S. 463, 469 (1943).

[12] In *United States* v. *Watson*, D.C. Cir. No. 22,775, decided January 19, 1970 (unreported), this Court, with one judge dissenting, affirmed a conviction of carrying a pistol without a license in violation of 22 D.C. Code § 3204. The Government's position in *Watson* was that the exception contained in § 3204 ("No person shall . . . carry either openly or concealed on or about his person, *except in his dwelling house or place of business or on other land possessed by him*, a pistol, without a license therefor issued . . .") stated an affirmative defense and not an element of the crime.

We submit, therefore, that the prosecutor was correct in arguing that the statutory exceptions were a matter of affirmative defense (Tr. 61). The court's instruction that such exceptions were an element that the Government must prove beyond a reasonable doubt (Tr. 81) was an erroneous windfall to which appellant was not entitled.

II. The prosecutor's questioning of appellant about a 1965 robbery conviction was proper in the circumstances of this case.

(Tr. 37-40, 44, 52-53)

Appellant was previously convicted of robbery and two counts of assault with a pistol, having been found guilty on January 14, 1966.[13] While testifying during the instant trial appellant stated, "I never owned [a gun] in my life" (Tr. 44). It was not until appellant made this obvious, deliberate comment that the prosecutor sought to impeach appellant with the robbery conviction (Tr. 44, 52). The court permitted the impeachment (Tr. 53).

To understand the rationale behind the court's ruling which permitted the impeachment we must examine the entire record. The prosecutor initially advised the court that he wished to impeach appellant with a 1965 robbery conviction. Defense counsel stated that appellant would testify regardless of any impeachment. The prosecutor commented that clearly the impeachment would be proper under *Gordon, supra.* At that juncture the record becomes somewhat hazy as to just what ruling the court made. We invite this Court's attention to the following colloquy:

> MR. BENNETT: . . . [I]t is abundantly clear [appellant] wants to testify.
> THE COURT: How about that, Mr. Schaefer?
> MR. SCHAEFER: Well, I can't stop it.

[13] The Court of course may take judicial notice of the proceedings in appellant's prior case, Criminal No. 1121-65, specifically the guilty verdict on January 14, 1966, and the judgment of conviction thereafter. For the Court's convenience we have reproduced the indictment in that case in the appendix, *infra*, p. 13.

THE COURT: He wants to testify.
MR. SCHAEFER: That is right.
THE COURT: All right. I will let you ask him, then. (Tr. 38.)

The court then recessed, and upon return another colloquy occurred, but it was off the record. Again the court recessed,[14] and afterwards appellant took the stand.

Before his testimony began, the court cautioned the prosecutor not to make reference to the robbery (Tr. 37-40). Regardless of whether the court ruled earlier that the Government could impeach appellant,[15] the court did request the prosecutor not to question appellant about the robbery (Tr. 40). Thus appellant is correct in stating in his brief that the court specifically forbade any *Luck*[16] impeachment. However, the court's denial of the prosecutor's *Luck* motion did not license appellant thereafter to claim, under oath, that he had "never owned a gun in his life" (Tr. 44) when his criminal record reflected the contrary. Appellant's denial of ever owning a gun created an unwarranted inference in his favor with the jury. The prosecution had knowledge that appellant's statement was untrue. The court was advised of appellant's previous convictions, and it permitted the use of the robbery not as a *Luck* impeachment but as impeachment on a subject brought up by appellant. Appellant having lied under oath, it was open to the prosecutor to let the jury know the truth so that it would not believe, contrary to fact, that appellant had an unblemished past.[17]

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[14] This time the recess was for lunch (Tr. 40).

[15] Our reading of the record translates the court's statement, "All right. I will let you ask him, then" (Tr. 38), as meaning that the court would permit the impeachment; however, in the context presented by this record the statement might have meant that the court granted a recess for purposes of defense counsel's definitely ascertaining the pleasure of his client.

[16] *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

[17] The Government could just as well have utilized the prior conviction of assault with a dangerous weapon (*i.e.*, a pistol) to

See Walder v. *United States*, 347 U.S. 62 (1954). The court was aware that appellant had been previously convicted of robbery and assault with a dangerous weapon. Those convictions justified the court's assumption that a gun had been involved.[18] *Cf. United States* v. *White*, 138 U.S. App. D.C. 364, 427 F.2d 634 (1970). The impeachment of appellant was proper. *Walder* v. *United States*, *supra*.

III. The admission of testimony that appellant was riding in a stolen car when arrested for two gun offenses was proper, despite the fact that appellant was never charged with unauthorized use of the vehicle.

(Tr. 6-24, 53)

Appellant was riding in a car driven by a juvenile when stopped by the police. The police soon discovered that the car was stolen from Avis Car Rental at National Airport. Equipped with knowledge that the car was stolen, Officer Kopacz asked appellant to alight from the front passenger seat. A loaded sawed-off shotgun was in appellant's hand, and a loaded revolver was on the seat where appellant had been sitting. Appellant was charged with possessing a sawed-off shotgun and carrying a pistol without a license. At trial testimony established that appellant was riding in a stolen car when arrested (Tr. 6-24, 53).[19] Appellant's labeling of such testi-

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impeach appellant by demonstrating the falsity of his statement on direct examination, notwithstanding *Brown* v. *United States*, 125 U.S. App. D.C. 220, 370 F.2d 242 (1966). *Brown* deals only with a *Luck*-type impeachment, not a *Walder*-type impeachment such as we have here.

[18] Of course the court's assumption that a gun had been involved was correct. Appellant was convicted in 1966 on two counts of an indictment (see appendix, *infra*, p. 13) which charged that he assaulted other persons with a pistol during the commission of a robbery, as well as being convicted of the robbery itself.

[19] Appellant states that the court cautioned the prosecutor not to question Officer Kopacz about the theft of the Avis rental car. We disagree with appellant's reading of the record. It was the prosecutor that cautioned Kopacz not to go into the car theft

mony as irrelevant, improper and prejudicial hardly describes the true nature of that evidence.

Initially we note that appellant could have been charged with unauthorized use of the vehicle and tried jointly with the two weapons charges;[20] however, Avis did not wish to prosecute, and the United States Attorney's Office apparently respected that wish (Tr. 24). Clearly the place from which the pistol was seized and appellant was sitting, *i.e.*, the car, was highly relevant and probative on the question of whether appellant (1) possessed the sawed-off shotgun and (2) carried the pistol outside his home or place of business without a license. The automobile was an important part of the Government's case, since it simultaneously contained appellant, the pistol and the sawed-off shotgun immediately prior to his arrest.

Additionally, at trial appellant never raised an objection to the prosecutor's line of proof about the stolen car; and had an objection been made, it would certainly have been overruled. Appellant simply fails to identify his prejudicial wound as *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), requires. The jury had the right to know all the circumstances surrounding appellant's possession of the pistol and the shotgun. The jury's verdict indicates that they were not prejudiced by the stolen car evidence, because they acquitted appellant on the charge of carrying the pistol which remained behind on the seat of the stolen car when appellant stepped out of the car. *See Spencer* v. *Texas*, 385 U.S. 554

(Tr. 21). The fact that the prosecutor later changed his tactics (Tr. 24, 53) is not error, particularly where neither the court nor defense counsel ever interrupted the prosecutor's presentation.

[20] Rule 8(a), FED. R. CRIM. P., provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character *or are based on the same act or transaction* or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. [Emphasis added.]

(1967); *cf. Barnes* v. *United States*, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967).

Consequently, since appellant could have been charged jointly for unauthorized use of the car and possessing the weapons, no objection was made, no prejudice has been shown and the jury acquitted appellant on the charge which relates to the evidence now under attack, appellant's argument lacks merit.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

APPENDIX

APPENDIX

[Filed October 4, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 1, 1965

Criminal No. 1121-65

Grand Jury No. 1285-65
1400.65.

Violation: 22 D.C.C. 2901, 502 (Robbery)
(Assault With Dangerous Weapon)

THE UNITED STATES OF AMERICA

v.

LARRY J. WILKERSON, DOZIER V. HAZIEL,
PAUL E. MATTHEWS

The Grand Jury charges:

FIRST COUNT:

On or about September 2, 1965, within the District of Columbia, Larry J. Wilkerson, Dozier V. Haziel and Paul E. Matthews, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Leon Halbmillion, property owned jointly by Leon Halbmillion and Helen Halbmillion, of the value of about $289.00, consisting of $289.00 in money.

SECOND COUNT:

On or about September 2, 1965, within the District of Columbia, Larry J. Wilkerson, Dozier V. Haziel and

Paul E. Matthews made an assault on Leon Halbmillion with a dangerous weapon, that is, a pistol.

THIRD COUNT:

On or about September 2, 1965, within the District of Columbia, Larry J. Wilkerson, Dozier V. Haziel and Paul E. Matthews made an assault on Richard Harris with a dangerous weapon, that is, a pistol.

A TRUE BILL:

/s/ James T. Walden
Foreman

/s/ John C. Conliff
Attorney of the United States in and for the District of Columbia

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 414885 470

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,111
(Cr. 223-69)

UNITED STATES OF AMERICA,

Appellee,

v.

LARRY J. WILKERSON,

Appellant.

APPELLANT'S REPLY

TO

BRIEF OF APPELLEE

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 2[illegible]

Nathan J. Paulson
CLERK

LEE G. LOVETT
JOSEPH F. HENNESSEY
ERIC T. ESBENSEN
1819 H Street, N. W.
Washington, D. C. 20006

Attorneys for Appellant,
Appointed By This Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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* Cases or authorities chiefly relied upon are marked by asterisks.

STATEMENT OF ISSUES

Appellant respectfully submits that the issues presented for review are those that were set forth initially in BRIEF OF APPELLANT; to wit:

1. Can Appellant's conviction for alleged possession of a prohibited weapon (sawed-off shotgun) under D. C. Code, Title 22, Section 3214(a) stand, in light of the fact that there was failure on behalf of the Government to introduce any evidence relating to one of the essential elements of the charged offense?

2. At trial, especially, in light of Luck and its progeny, is testimony relating to a prior conviction of Appellant for robbery (under D. C. Code, Title 22, Section 2901) admissible when the previous offense occurred 5 years before the trial in question (when Appellant was a juvenile) and where the charged offense at trial is possession of a prohibited weapon (under D. C. Code, Title 22, Section 3214(a))?

3. Does the admission of testimony that Appellant was riding in an automobile (when stopped by police officers) allegedly taken without permission have any relevance to the offense of possession of a prohibited weapon; and did the admission of such testimony so prejudice Appellant that it was impossible for him to receive a fair trial?

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	Case No. 24,111
	)	Criminal No. 223-69
LARRY J. WILKERSON,	)	
	)	
Appellant.	)	

APPELLANT'S REPLY TO BRIEF OF APPELLEE

Larry J. Wilkerson, Appellant herein, by his Court-appointed attorneys, herewith respectfully submits his Reply to Brief of Appellee.

QUESTIONS RELATING TO APPELLANT'S PRIOR CONVICTION WERE NOT PROPER

As Appellee admits in its Brief, "the record becomes somewhat hazy as to just what ruling the Court made" regarding impeachment of Appellant by questioning him about his prior conviction. (Appellee's Brief, p. 14).

Throughout its Brief, Appellee attempts to insert its interpretation of the record. However, the record speaks for itself.

An examination of the record clearly indicates that prior to the time Appellant took the stand to testify, the Government, before the bench, attempted to justify impeachment. The following statement, albeit somewhat confused, is apparently that justification:

> "[GOVT. COUNSEL]: I would point out to the Court, if Your Honor please, that the fact the defense announced he is taking the stand, one of the very foundation stones of the Gordon, absent that, when you are confronted with a situation where the admission of the prior record may keep him from telling his story, it is abundantly clear he wants to testify." (Tr. 38)

However, as the afternoon session began, just prior to the time Appellant took the stand, the Court clearly cautioned the Government <u>not to question Appellant about his prior conviction</u> (Tr. 40).

Appellee admits that the Court specifically forbade any impeachment at this juncture of the proceedings; however, Appellee reasons that Appellant's later statement denying ownership of a gun provided sufficient basis for subsequent impeachment.

The record is devoid of evidence from which the Court could reasonably draw the conclusion that Appellant actually did own a gun. No proof or evidence of Appellant's possible ownership of a gun was offered the Court by the Government. The record is clear that the Court did not have independent knowledge of prior ownership of a gun (Tr. 37).

The Government argues that Appellant's prior conviction justified the Court's assumption that a gun had been involved. At page 16, footnote 18, of its Brief, the Government makes reference to the indictment (which was attached as an Appendix) under which Appellant was subsequently convicted. This indictment indicates the following:

> "SECOND COUNT:
>
> On or about September 2, 1965, within the District of Columbia, Larry J. Wilkerson, Dozier V.

> Haziel and Paul E. Matthews made an assault on Leon Halbmillion with a dangerous weapon, that is, a pistol.
>
> "THIRD COUNT:
>
> On or about September 2, 1965, within the District of Columbia, Larry J. Wilkerson, Dozier V. Haziel and Paul E. Matthews made an assault on Richard Harris with a dangerous weapon, that is, a pistol."

The indictment is clear that three individuals, including Appellant, were involved in the assault(s). Yet, it is equally clear that a single dangerous weapon, "that is, a pistol" was involved.

Just as there is no indication from the indictment which of the individuals possessed or owned the weapon in question, there was no evidence offered the Court that Larry Wilkerson, Appellant herein, did, in fact, ever own a gun. Thus, it is indisputable that Appellant was likely telling the truth when he testified, under oath, that he had never owned a gun in his life.

It is surprising that Appellee relies on Walder v. United States, 347 U.S. 62 (1954) in light of the

guidelines subsequently pronounced in Luck v. United States, 121 U. S. App. D.C. 151, 348 F.2d 763 (1965); Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967); and their progeny.

In Walder, supra, specific testimony from a witness was allowed to impeach the Appellant. That is, specific testimony indicating that Walder had been involved with narcotics at an earlier date (although the product of an illegal search and seizure) was allowed into evidence. Moreover, in Walder, the denial contradicted an affidavit filed by the defendant in the earlier proceeding in connection with his motion to suppress unlawfully seized evidence.

Walder (with two Supreme Court Justices dissenting) has been distinguished and seriously questioned in numerous cases. See United States v. Fox, 403 F.2d 97 (2nd Cir. 1968), United States v. Pinto, 394 F.2d 470 (3rd Cir. 1968). In United States v. Clemmons, 390 F.2d 407 (6th Cir. 1968), the Court not only distinguished Walder, but noted that the impeachment in question was based on episodes occurring eight

years earlier. The Court cited Sherman v. United States, 356 U.S. 369 (1958), noting that the Supreme Court held therein that a nine year old sales conviction and a five year old possession conviction were not probative, and thus declared that the impeaching testimony "was not only probative of nothing relevant but was also too remote." Here, Appellant Wilkerson was questioned about a conviction occurring some five years earlier when he was a juvenile.

More importantly, however, the Government fails to recognize that there is a specific duty on the judge to make sufficient inquiry to inform himself on the relevant considerations concerning the prior conviction of Appellant. Jones v. United States, 131 U.S. App. D.C. 88, 402 F.2d 639 (1968). As noted earlier, the record does not reflect any evidence from which the Court could reasonably infer that Appellant actually did own a gun.

In the instant situation, no impeaching evidence was proferred. Moreover, Appellant did not impeach himself regarding possible prior ownership of a gun; the Government

merely asked, "Are you the same Larry J. Wilkerson convicted of robbery in 1965?" The record indicates that no questions relating to assault with a deadly weapon were asked.

It is manifest that the elicited testimony regarding Appellant's prior conviction was so prejudicial that it was impossible for Appellant to receive a fair trial. His conviction should be reversed.

ADMISSION OF TESTIMONY THAT AUTOMOBILE IN WHICH APPELLANT WAS RIDING WAS TAKEN WITHOUT PERMISSION WAS ERROR

Appellee's argument that the place in which Appellant was sitting (a car) was highly relevant and probative to the question of whether Appellant possessed a sawed-off shotgun is without merit.

For a reason or reasons unknown, the Government obviously could not prove the offense concerning the automobile allegedly taken without permission; thus, no charges were made against any of the individuals involved.

The admission of testimony elicited by the Government, first from a prosecution witness (after having been specifically cautioned about not mentioning the automobile) (Tr. 24), and second, after having been given permission to question Appellant regarding his prior conviction (Tr. 52), is clearly error. There is no correlation between the automobile in which Appellant was riding and his possession of a sawed-off shotgun. It is obviously inconsistent with the traditional concept of a fair trial to permit introduction of any evidence which might influence the jury to convict the defendant for any reason other than his guilt of the specific offenses with which he is charged. United States v. Harris, 331 F.2d 185 (4th Cir. 1964).

Such admission of evidence here was clearly improper and serves to highlight the injury inuring to Appellant by the admission of testimony which had the effect of distracting the jury with evidence of criminal activities which had not been charged.

The cumulative effect of this testimony and the testimony of Appellant's prior conviction was so prejudical that he could not (indeed, did not) receive a fair trial.

ALL ELEMENTS OF THE CRIME WERE NOT PROVEN BEYOND A REASONABLE DOUBT

Initially, it must be noted that Appellee begins its argument by declaring that the defense in the court below made no motion for judgment of acquittal at the close of the Government's case which related to Appellant's "specific objections on appeal."

The record indicates (Tr. 36) that counsel for the defendant, in making his motion, noted that "the Government has failed to completely carry their burden." This is precisely the point. The record at this juncture of the trial (in fact, the entire record) is devoid of evidence from which the jury could determine that the Appellant was not one of the specified individuals who, according to the statute in question, could possess a sawed-off shotgun.

More significantly, however, Appellee argues that the Trial Court recognized that "appellant's own testimony excluded him from the company of any of the exceptions (Tr. 61)." An examination of the record indicates the following colloquy before the bench while the jury was out of the courtroom:

> "[GOVT. COUNSEL]: On the first one, on 3214(a), I must confess I didn't anticipate this as to the various occupations you referred to, isn't that normally an affirmative defense?
>
> "[THE COURT]: It is an element of the case. He takes the stand and he testified he was none of these, so the evidence on which the instruction could be predicated....
>
> "[GOVT. COUNSEL]: Very well, Your Honor." (Emphasis supplied.)

A fair interpretation of the Court's statement is that, in addition to noting that the statutory reference to the various occupations are an element to the crime, the Government was receiving instructions as to eliciting evidence that Appellant was not employed in any of the statutory occupations. Note the tense of the statement, "He takes the stand...."

Additionally, Appellee argues that defense counsel acknowledged that Appellant was not employed in any of the statutory occupations. However, such a statement before the bench, out of hearing of the jury, is not significant!

It is axiomatic that it is encumbent upon the jury to make its determination from all the evidence elicited at trial. The jury must follow the instructions given by the judge. The law of the case is that stated by the judge. The judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise, bias, or prejudice. Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954).

In the instant situation, all of the comments that Appellee relies upon as excluding Appellant from the listed statutory exceptions were made out of the presence of the jury. Thus, reliance on same is meaningless.

The judge specifically instructed the jury there were two elements of the charged crime (Tr. 81). In not proving all elements of the crime, there was a basic deficiency in the Government's case. The record speaks for itself.

We are not concerned with the adequacy of the indictment as Appellee argues in citing Cook v. United States, 84 U.S. 168 (1872), and United States v. Watson, D. C. Cir. No. 22,775, decided January 19, 1970 (unreported). The jury was instructed by the judge that there were two elements to the crime. The record is devoid of evidence from which the jury could reasonably infer that Appellant was not employed in one of the statutory occupations. Appellee tacitly agrees with Appellant in this respect when it is recognizes that "the court's instruction that such exceptions were an element that the Government must prove beyond a reasonable doubt (Tr. 81) was an erroneous windfall to which appellant was not entitled." (Appellee's Brief, p. 13)

Of course, the Court's instructions cannot be entitled a "windfall." The Government agrees that "it is basic law that every essential element of the offense must be proved by the Government." Precisely. Appellant's conviction should be reversed.

REQUEST FOR EARLY
CALENDARING OF CASE

Appellant respectfully requests that this case be calendared for argument at an early date.

On May 21, 1970, Lee G. Lovett, Esquire, was appointed by this Court to represent Appellant in this proceeding. On May 27, 1970, a Motion to Appoint Co-Counsel was filed; said Motion was granted on June 9, 1970.

On July 10, 1970, Appellant filed a Motion for Extension of Time for filing his Brief since the transcript of proceedings in the court below had not been received. This Motion was granted July 20, 1970. The Transcript of Proceedings was received in August 1970.

On August 19, 1970, because of the nature of the questions presented, and in order to ease the Court's burden by providing an expeditious means of disposing of this appeal, Appellant filed a Motion for Summary Reversal. On August 28, 1970, Appellee filed its Opposition to Motion

for Summary Reversal. Appellant's Reply to Appellee's Opposition was filed September 3, 1970.

On October 7, 1970, this Court denied Appellant's Motion for Summary Reversal and ordered the time for filing of Appellant's Brief be extended 30 days.

On November 6, 1970, Appellant filed his Brief. On November 17, 1970, Appellee filed a Motion For Extension Of Time In Which To File Appellee's Brief until January 13, 1971 — approximately 60 days. This Motion was granted December 3, 1970.

On January 14, 1971, Appellee filed a Motion For Leave To File Appellee's Brief, Time Having Expired, and the Brief of Appellee.

It is respectfully submitted that Appellant has worked expeditiously to resolve this proceeding; however, Appellee has received extensions of time and has not timely filed briefs. Therefore, in view of the foregoing, it is respectfully requested that the Court order early calendaring of the appeal.

WHEREFORE, in view of the foregoing, it is respectfully requested that the judgment of the District Court be reversed and the case remanded for a new trial, or such other action that the Court may deem appropriate.

Respectfully submitted,

/s/ Lee G. Lovett
Lee G. Lovett

/s/ Joseph F. Hennessey
Joseph F. Hennessey

/s/ Eric T. Esbensen
Eric T. Esbensen

Court-Appointed Counsel
for Appellant.

January 28, 1971.

CERTIFICATE OF SERVICE

I, Eric T. Esbensen, hereby certify that two copies of the foregoing APPELLANT'S REPLY TO BRIEF OF APPELLEE were mailed, first-class, postage prepaid, this 28th day of January, 1971, to John A. Terry, Esquire, Assistant United States Attorney, U. S. Court House, Washington, D. C. 20001.

/s/ Eric T. Esbensen
Eric T. Esbensen
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Washington, D. C. 20006

Court-appointed Counsel
for Appellant.